

The Legal Framework Regarding the Distribution of Insurance-Based Investment Products: the EU and UK Approach

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Abstract

This article comparatively discusses the EU and UK position in relation to insurance-based Investment Products (IBIPs). We discuss the impact of the IDD on IBIPs, compare the effect of MiFID II and IDD on IBIPs, analyse ESMA's response on the draft regulatory technical standards (RTS) and the FCA's IDD consultations before drawing conclusions on IBIPs and their function in an era where there is liberalization of the EU financial services sector.

Subject: Insurance; Financial Services

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1. Introduction

Insurance-based investment products (IBIPs) constitute a vivid example of the intersection of different financial sectors within a distinct sectoral regulation entailing a life insurance element and an investment one. Contracts of insurance with a link to investment were developed since the 1960s-1970s. More specifically, in the last decades, the pattern for European legislation has been to legislate for banks in the first instance and then to apply the same rules with minor modifications to investment

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firms. Insurance regulation has followed a slightly different path in that there have been attempts to integrate insurance regulation with the regulation of banking and investment business at European level, and this was principally due to the fact of the different nature of underlying risks and business models involved.

Directive 2016/97 on Insurance Distribution (IDD), defines IBIPs as insurance products offering a maturity value wholly or partially exposed, directly or indirectly, to market fluctuation, and not including non-life policies, life insurance policies which cover only death, incapacity due to injury, sickness or disability, pension products, occupational pensions schemes and individual pension products.¹

2. PRIIPs - Evolution and Role

The PRIIPs Regulation represents an innovative approach within the scope of the regulation of EU financial services, and applies cross-filed, for it covers multiple common featured products which may have different forms or routes but all have been created so as to provide investment opportunities to retail investors.² The aim of the PRIIPs Regulation is to encourage efficient EU markets by helping investors to better understand and compare the key features, risk, rewards and costs of different PRIIPs, through access to a short and consumer-friendly Key Information Document (KID).³ The PRIIPs Regulation applies to persons who manufacture PRIIPs, or advise on or sell PRIIPs. Hence, a PRIIP manufacturer (or any other person who changes an existing PRIIP, such as a distributor) is required to prepare a KID for each PRIIP that they produce and to publish each KID on their website. A person who advises a retail investor on a PRIIP or sells a PRIIP to a retail investor must provide the retail investor with a KID in good time before any transaction is concluded. In addition to advisers,

¹ Article 2 para 1(17) of IDD.

² Recital (6) of the PRIIPs Regulation.

³ FCA, PRIIPs disclosure: Key Information Documents, 12/5/2017, <https://www.fca.org.uk/firms/priips-disclosure-key-information-documents>

this will impact intermediaries such as distributors. Where the retail investor initiates the transaction by means of distance communications, the KID may be provided after the conclusion of the transaction so long as it is not possible to provide the KID in advance and the retail investor consents. The retail investor must be told that it is not possible to provide the KID in advance, and that they can delay the transaction, to receive and read the KID before concluding the transaction.⁴ The KID includes all the information relevant for the investment decision of the individual retail investor in a concise way. The KID is an addition to the existing retail investor information obligations. The products covered by the new regulation include investment funds, structured products and structured deposits (packaged retail investment products), as well as life insurances with investment elements (insurance-based investment products), such as life insurances based on funds or index-linked life insurances. Taken together, these categories are referred to as PRIIPs, which the regulation is named after. However, certain types of life insurance, such as life insurance products where the benefits are only payable upon death or incapacity for work, are not within the scope of the regulation. This is also applicable for other insurance products, such as life insurances for which the redemption value is not exposed to market fluctuations. The regulator aims to establish a "level playing field" between providers of financial products and insurance products respectively, with regards to retail investor information standards. Generally, the KID must be provided to the investor before the PRIIP is purchased, or, before the investor has undertaken any obligation. An exception applies only when the investor initiates the transaction, concludes the transaction using a mean of long distance communication, the provision of a KID is not possible. In such a case, the investor has to be informed that the provision of a KID is not possible and that he has the option to delay the transaction in order to receive the KID before concluding the transaction and that the investor actively consents receiving the KID after the transaction. The harmonizing aim of the Regulation is apparent from the power granted to EIOPA to temporarily intervene in the promotion or sale of insurance-based investment products in the EU. This

⁴ FCA, PRIIPs disclosure: Key Information Documents, 12/5/2017, <https://www.fca.org.uk/firms/priips-disclosure-key-information-documents>

is consistent with the powers granted to other ESAs under MiFID II in respect of specific non-insurance investments.⁵

3. The IDD and its Impact on insurance and more specifically on IBIPs

On 20 January, 2016, the Council of the European Union issued the IDD. Although aimed at minimum harmonization, the IDD fully recasts the IMD. The IDD will be implemented by all EU Member States by 23 February, 2018. Following the wave of other regulatory changes, such as MiFID II and PRIIPS Regulation, the IDD intends to strengthen consumer protection, improve the competitive landscape of the European insurance industry, and reduce cross-sectoral inconsistencies. However, the Directive is aimed at minimum harmonization and therefore does not preclude Member States from maintaining or introducing more stringent provisions, provided that these are consistent with the Directive.⁶

By introducing new defined terms such as 'insurance distribution' and 'insurance distributor', the IDD significantly extends the scope of application as compared to that of the IMD. Some of the IDD provisions place obligations on insurance distributors only, whilst others make reference to consumers or customer. There is no general definition of consumer or customer in the final text of IDD but it is clear from the use of the terms that they cover retail customers. The term professional client is used in the IDD but only in Recital 51 and Article 22(1). It is defined, by reference to Article 4(1)(10) of MiFID II, to mean a client who possesses the experience, knowledge and expertise to make their own investment decisions and properly assess the risks they incur. The definition expressly includes pension funds and management companies of such funds. Recital 51 of the IDD confirms that,

⁵ Pinsent Masons, "Are the KIDs alright?", 2016 <https://www.pinsentmasons.com/en/media/legal-updates/are-the-kids-alright/>

⁶ Clifford Chance, MiFID II & IDD: The impact on insurance based investment ("IBI") products, June 2016, [file:///C:/Users/kpkn201/Downloads/MiFID II and IDD the impact on insurance based investment products 6032695%20\(4\).pdf](file:///C:/Users/kpkn201/Downloads/MiFID%20II%20and%20IDD%20the%20impact%20on%20insurance%20based%20investment%20products%206032695%20(4).pdf)

in some cases, where the customer is a professional client there is less need for the provision of information to enable a customer to make an informed choice. This expectation is confirmed in Article 22(1) IDD which allows Member States to disapply the IDD information requirements where a customer is a professional client but only in respect of IBIPs. In addition to the IDD drafting points above, the FCA is afforded discretion to apply higher standards in some areas than under the IDD itself, so the ultimate impact on a business is subject to the FCA's approach to transposition of the IDD requirements.⁷

The IDD requirements which are applicable to all insurance products can be summarised as follows: a) Duty to act in customers' best interests: as per article 17 IDD, there exists a new general principle on insurance distributors to always act honestly, fairly and professionally in accordance with the best interests of their customers; b) Provision of general information: as per article 18 IDD, in good time before the conclusion of an insurance contract, an insurance intermediary/ undertaking must disclose its identity and address; the fact that it is an insurance intermediary or insurance undertaking, as appropriate; whether it provides advice about the insurance products sold; the procedures enabling customers and other interested parties to register complaints as referred to in article 14 IDD; the out-of-court complaint and redress procedures (article 15 IDD); c) Conflicts of interest and transparency: as per article 19 IDD, an— an insurance intermediary must provide customers in good time before the conclusion of an insurance contract with various types of information, including whether it has a direct or indirect holding representing 10% or more of the voting rights or capital in a given insurance undertaking; whether a given insurance undertaking or parent undertaking of a given insurance undertaking has a direct or indirect holding representing 10% or more of the voting rights or capital in the insurance intermediary; In relation to the contracts proposed or advised on, whether advice is given on the basis of a 'fair and personal analysis' or where there is a contractual obligation regarding exclusivity with one or more insurance undertakings (and,

⁷ Clifford Chance, MiFID II & IDD: The impact on insurance based investment ("IBI") products, June 2016, [file:///C:/Users/kpkn201/Downloads/MiFID II and IDD the impact on insurance based investment products 6032695%20\(4\).pdf](file:///C:/Users/kpkn201/Downloads/MiFID%20II%20and%20IDD%20the%20impact%20on%20insurance%20based%20investment%20products%206032695%20(4).pdf)

if so, the names of the insurance undertakings must be provided); or if neither of the earlier conditions apply, then the insurance intermediary must provide the names of the insurance undertakings with which it may and does conduct business); the nature of the remuneration (i.e. a fee, commission or some other economic benefit in kind) received in relation to the insurance contract (but not amount);

d) advised and non-advised sales standards: as per article 20 IDD there are various requirements in relation to sales, including whether it has a direct or indirect holding representing 10% or more of the voting rights or capital in a given insurance undertaking; whether a given insurance undertaking or parent undertaking of a given insurance undertaking has a direct or indirect holding representing 10% or more of the voting rights or capital in the insurance intermediary; in relation to the contracts proposed or advised on, whether advice is given on the basis of a fair and personal analysis or where there is a contractual obligation regarding exclusivity with one or more insurance undertakings (and, if so, the names of the insurance undertakings must be provided); or if neither of the earlier conditions apply, then the insurance intermediary must provide the names of the insurance undertakings with which it may and does conduct business); the nature of the remuneration (i.e. a fee, commission or some other economic benefit in kind) received in relation to the insurance contract (but not amount)

e) advised and non-advised sales standards: as per article 20 IDD there are various requirements in relation to sales, such as the requirement that prior to the conclusion of an insurance contract, the insurance distributor must specify, on the basis of information obtained from the customer, the demands and the needs of that customer and provide objective information in a comprehensible form to allow that customer to make an informed decision on the product; the requirement that for non-life insurance products, the product information must be provided in the form of an insurance product information document drawn up by the insurer, the details of which are specified in Article 20(7) and (8) IDD.⁸

⁸ Clifford Chance, MiFID II & IDD: The impact on insurance based investment ("IBI") products, June 2016, [file:///C:/Users/kpkn201/Downloads/MiFID II and IDD the impact on insurance based investment products 6032695%20\(4\).pdf](file:///C:/Users/kpkn201/Downloads/MiFID%20II%20and%20IDD%20the%20impact%20on%20insurance%20based%20investment%20products%206032695%20(4).pdf)

Under the IDD, an IBIP is one which offers a maturity or surrender value and which has an 'investment element' i.e. where that maturity or surrender value is wholly or partially exposed, directly or indirectly, to market fluctuations. This part of definition is the same as that used for IBIP in the PRIIPS Regulation, which requires a pre-contractual disclosure document (i.e. a KID) for certain products, including IBIPs. However, the IDD definition expressly excludes: (a) non-life insurance products as listed in Annex I to the Solvency II Directive 2009/138/EC (Classes of Non-life Insurance); life insurance contracts where the benefits under the contract are payable only on death or in respect of incapacity due to injury, sickness or disability; (c) pension products which, under national law, are recognised as having the primary purpose of providing the investor with an income in retirement, and which entitle the investor to certain benefits; (d) officially recognised occupational pension schemes falling under the scope of the Occupational Pension Funds Directive 2003/41/EC or Solvency II; and (e) individual pension products for which a financial contribution from the employer is required by national law and where the employer or the employee has no choice as to the pension product or provider. These exclusions result in a small selection of products, for example, unit-linked policies, with-profits policies and investment-linked income annuities (which are not considered pension products) that must comply with the IDD additional consumer protection requirements and, as confirmed by Recital 42 of the IDD, provide information in the form of a KID too.⁹

Article 26 IDD makes clear that Chapter VI requirements which apply only to IBIPs are additional to the requirements set out in Article 17, 18, 19 and 20 (detailed in the box opposite) which apply to all products within scope of the IDD. Broadly, the additional IDD requirements on IBIPs are as follows: a) Article 27:— Prevention of conflicts of interest; b) Article 28: Conflicts of interest; c) Article 29: Information to customers; d) Article 30: Assessment of suitability and appropriateness and reporting to customers.

⁹ Clifford Chance, MiFID II & IDD: The impact on insurance based investment ("IBI") products, June 2016, [file:///C:/Users/kpkn201/Downloads/MiFID II and IDD the impact on insurance based investment products 6032695%20\(4\).pdf](file:///C:/Users/kpkn201/Downloads/MiFID%20II%20and%20IDD%20the%20impact%20on%20insurance%20based%20investment%20products%206032695%20(4).pdf)

Under Article 27 IDD, an insurance intermediary or an undertaking carrying on distribution of IBI products is expected to maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps to prevent a conflict of interests, which as determined under Article 28 IDD, could adversely affect the interests of customers.

The wording in Article 27 is purposefully vague because the IDD, like the IMD, is a minimum harmonisation instrument. This means that the details as to what 'effective organisational and administrative arrangements' are necessary will be determined by the national competent authorities. In the UK, the FCA is therefore expected to align IDD conflict requirements with those in its COBS and SYSC regime, both of which effectively stem from Principle 8 of the FCA's Principles for Business, which states that "a firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client." The FCA's course of action is subject to Article 28(3) IDD. This confers a power on the European Commission to adopt delegated acts, which will be directly effective and will: a) define the steps that insurance intermediaries and insurance undertakings might reasonably be expected to take to identify, prevent, manage and disclose conflicts of interest when carrying out insurance distribution activities; and b) establish appropriate criteria for determining the types of conflicts of interest whose existence may damage the interests of customers or potential customers.¹⁰

It seems counter-intuitive for a minimum harmonisation directive to specify more detail through delegated acts but it will be interesting to see how detailed the provisions turn out to be. In any case, the FCA flagged in its Thematic Review TR14/9 "Commercial insurance intermediaries – conflicts of interest and intermediary remuneration" May 2014,¹¹ that conflicts of interest and their management was an area of concern and that there would be more proactive engagement with the

¹⁰ Clifford Chance, MiFID II & IDD: The impact on insurance based investment ("IBI") products, June 2016, [file:///C:/Users/kpkn201/Downloads/MiFID II and IDD the impact on insurance based investment products_6032695%20\(4\).pdf](file:///C:/Users/kpkn201/Downloads/MiFID%20II%20and%20IDD%20the%20impact%20on%20insurance%20based%20investment%20products_6032695%20(4).pdf)

¹¹ FCA, Thematic Review TR14/9, Commercial insurance intermediaries – Conflicts of interest and intermediary remuneration Report on the thematic project, May 2014, <https://www.fca.org.uk/publication/thematic-reviews/tr14-09.pdf>

intermediary industry to understand the application of current FCA rules. The FCA has identified this as an area which is ripe for change and so insurers and insurance intermediaries should take steps now to ensure that their own conflicts identification and management are not lacking. In addition to Article 18 and 19 IDD information requirements, insurance intermediaries and undertakings must comply with Article 29 IDD requirements in relation to IBI products including the following, as a minimum, in good time before a contract is concluded: a) where advice is provided, whether a periodic assessment of the suitability of the IBI products recommended to that customer will also be provided; b) appropriate guidance on, and warnings of, the risks associated with the IBI products or in respect of particular investment strategies proposed; c) cost information relating to the distribution of the IBI product, including the cost of advice, where relevant, the cost of the IBI product recommended or marketed to the customer, and how the customer may pay for it. The IDD also requires that information about costs and charges that are not caused by the occurrence of underlying market risk must be in aggregate form to allow the customer to understand the overall cost, as well as the cumulative effect on the investment return. If the customer requests, an itemised breakdown of the costs and charges must be provided. The IDD, also under Article 29(3), allows Member States to impose stricter IBIP information requirements. Given that consumer protection is part of the FCA's strategic objective the FCA is expected to use this directive discretion to implement higher requirements, but the impact of these may be limited given that the UK has already gold plated the IMD and has banned commissions on investment products altogether under the Retail Distribution Review. However such raising of standards is subject to Article 29(4) IDD which allows the Commission to adopt delegated acts to specify the criteria for assessing whether inducements paid or received by an insurance intermediary or insurance undertaking have a detrimental impact on the quality of the relevant service to the customer and the compliance of insurance intermediaries and insurance

undertakings paying or receiving inducements with the obligation to act honestly, fairly and professionally in accordance with the customer's best interests.¹²

Finally, article 30 IDD requires an insurance intermediary or insurance undertaking providing advice on an IBIP to conduct an assessment to ascertain the suitability and appropriateness of a product. This requirement is replicated from that imposed by on investment firms by Article 25 of MIFID II.¹³ Suitability assessment: this assessment, required under Article 30(1) IDD will need the following information to be acquired about the customer: a) knowledge and experience in the investment field relevant to the specific type of product or service; b) financial situation, including the ability to bear losses; c) investment objectives, including their risk tolerance. To ensure the above obligations are met, the information could be obtained by asking customers to fill out a questionnaire and to submit documents to evidence their financial position. A credit check and score could also demonstrated some of the above requirements. In any case, the suitability assessment should be documented. Additionally, a record of any documents which set out the rights and obligations of the parties must be retained. Suitability statement: under Article 30(5) IDD, insurance intermediaries or insurance undertakings must, before concluding the IBI product contract, provide the customer with a suitability statement on a durable medium which must specify the advice given and how it meets the customer's preferences, objectives and other characteristics. A durable medium is defined in Article 2 (18) as an instrument which: (a) enables a customer to store information addressed personally to that customer in a way accessible for future reference and for some time period adequate for the purposes of the information; and (b) allows the unchanged reproduction of the information stored. For example, a PDF copy of a document setting out a suitability statement for example would meet the above requirements. Where the contract is concluded using a means of

¹² Clifford Chance, MiFID II & IDD: The impact on insurance based investment ("IBI") products, June 2016, [file:///C:/Users/kpkn201/Downloads/MiFID II and IDD the impact on insurance based investment products_6032695%20\(4\).pdf](file:///C:/Users/kpkn201/Downloads/MiFID%20II%20and%20IDD%20the%20impact%20on%20insurance%20based%20investment%20products_6032695%20(4).pdf)

¹³ Clifford Chance, MiFID II & IDD: The impact on insurance based investment ("IBI") products, June 2016, [file:///C:/Users/kpkn201/Downloads/MiFID II and IDD the impact on insurance based investment products_6032695%20\(4\).pdf](file:///C:/Users/kpkn201/Downloads/MiFID%20II%20and%20IDD%20the%20impact%20on%20insurance%20based%20investment%20products_6032695%20(4).pdf)

distance communication (via, for example, the telephone or by email exchange) that prevents prior delivery of the suitability statement, the insurance intermediary or insurance undertaking can provide the suitability statement on a durable medium immediately after the customer is bound by any contract. However, this can only be done if the following conditions are met, i.e. a) that the customer has consented to receiving the suitability statement without undue delay after the contract is concluded and b) that the insurance intermediary or insurance undertaking has given the customer the option of delaying the conclusion of the contract to receive the suitability statement in advance. The above requirements could be met by asking a customer to tick a box indicating consent if the exchange is via email, or by verbally recording consent if the discussion is conducted via the telephone.

Appropriateness assessment: if no advice is given during the sale of an IBIP, the insurance intermediary or insurance undertaking must ask the customer or potential customer to provide information regarding that person's knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded. If the customer does not provide the necessary information, then a warning should be given and recorded to confirm that the IBI product may not be appropriate.¹⁴

4. IDD, MiFID II and Further Technical Advice Sought

From October 2014 to January 2015, EIOPA conducted a public consultation on Guidelines on the product oversight and governance arrangements by insurance undertakings.¹⁵ The paper contained provisions related to the manufacturers of insurance products in Chapter 1 and provisions

¹⁴ Clifford Chance, MiFID II & IDD: The impact on insurance based investment ("IBI") products, June 2016, [file:///C:/Users/kpkn201/Downloads/MiFID_II_and_IDD_the_impact_on_insurance_based_investment_products_6032695%20\(4\).pdf](file:///C:/Users/kpkn201/Downloads/MiFID_II_and_IDD_the_impact_on_insurance_based_investment_products_6032695%20(4).pdf)

¹⁵ EIOPA, Consultation Paper on the proposal for preparatory Guidelines on product oversight & governance arrangements by insurance undertakings and insurance distributors, EIOPA-CP-15/008, https://eiopa.europa.eu/Publications/Consultations/EIOPA-CP-15-008_Consultation%20Paper%20on%20POG%20Guidelines%20for%20insurance%20undertakings%20and%20in%20distributors.pdf

on insurance distributors, which have been added in Chapter 2. The EIOPA Guidelines,¹⁶ which were finalised in April 2016, provide high level expectations on IDD requirements and should be adhered to given they are designed to prevent mis-selling. However, the Guidelines will look very familiar to UK distributors and issuers.¹⁷

In February 2016, EIOPA was asked with a formal “Request for Advice” by the European Commission to provide technical advice on possible delegated acts to further specify certain aspects of the IDD. In relation to non-complex insurance-based investment products the Commission sought EIOPA’s response as to the criteria to assess such products. Drawing from the relevant provisions in the IDD (articles 30(3) (a), 30(6)) and in MiFID II (article 57) although an assessment of the suitability or appropriateness of an IBIP for the customer by the insurance distributor is generally required as part of an advised or non- advised sale (IDD article 30 (1),(2)), Member States are allowed (IDD article 30(3)) to derogate from these obligations and to not require either a suitability or appropriateness test to be conducted, where various conditions are satisfied. Such sales (“execution only”) although carried out only at the initiative of the customer still require the insurance distributor to specify the demands and needs of the customer prior to the conclusion of the contract (IDD article 20(1)). One of the conditions specified in Article 30(3) to determine whether an IBIP can be distributed as an execution-only sale relates to the complexity of the IBIP. IBIPs can be considered non-complex when they only provide investment exposure to the financial instruments deemed non-complex under MiFID II and do not incorporate a structure which makes it difficult for the customer to understand the risks involved (IDD article 30(3)(a)(i)). In accordance with Article 25(8) of MiFID II, the Commission is empowered to adopt delegated acts on the criteria identify “other non-complex financial instruments” referred to in Article 25(4)(a)(vi) of the same Directive. Also, Article 30(3)(a)(ii) of IDD

¹⁶ EIOPA, Final Report on Public Consultation on Preparatory Guidelines on product oversight and governance arrangements by insurance undertakings and insurance distributors, EIOPA-BoS-16-071, <https://eiopa.europa.eu/Publications/Reports/Final%20report%20on%20POG%20Guidelines.pdf>

¹⁷ Clifford Chance, MiFID II & IDD: The impact on insurance based investment ("IBI") products, June 2016, [file:///C:/Users/kpkn201/Downloads/MiFID II and IDD the impact on insurance based investment products 6032695%20\(4\).pdf](file:///C:/Users/kpkn201/Downloads/MiFID%20II%20and%20IDD%20the%20impact%20on%20insurance%20based%20investment%20products%206032695%20(4).pdf)

acknowledges the possibility that IBIP may not fall within the scope of Article 30(3)(a)(i), but may still be deemed a non-complex product. EIOPA considered that where an IBIP incorporates a structure which makes it difficult for the customer to understand the risks involved, it is in all cases not fit for distribution via an execution-only sale. EIOPA's evidence gathering has shown that there are only a limited number of IBIP types currently sold execution-only. Whilst numerous Member States allow for the sale of certain products on a non-advised basis, only a limited number allow for products to be sold by means of execution-only transactions. In relation to the criteria for the assessment of other non-complex financial instruments, as per the draft Commission Delegated Regulation under MiFID II, EIOPA has included the provisions in its technical advice where these criteria address product features, which are considered to be equally applicable to IBIPs.¹⁸ Regarding the nature of any guarantee provided by the insurance undertaking, where the latter provides a guarantee regarding the surrender and maturity value of an IBIP, the customer is not fully exposed to the performance of the financial instruments in which the insurance undertaking has invested or to which the customer's benefits are linked. In view of this, depending on the nature of the guarantee, IBIPs could be regarded as non-complex, even though the contract may provide investment exposure that is not limited to financial instruments deemed non-complex under MiFID II. In this case, EIOPA considered that as a minimum the customer should be guaranteed to receive, at both surrender and maturity, at least the amount of the premiums that they have paid, minus legitimate costs levied.

In accordance EIOPA issued the following technical advice: "An IBIP shall be considered as non-complex for the purposes of Article 30(3)(a)(ii) of Directive (EU) 2016/97 if it satisfies all of the following criteria: (a) the contractually guaranteed minimum surrender and maturity value is at least the amount of premiums paid by the customer minus legitimate costs levied. (b) it does not

¹⁸ However, in these cases it was still necessary to modify some of the MiFID II requirements to appropriately reflect the insurance sector. In particular, regarding the provision in point (d) of the technical advice, given that exit penalties have been a feature of long term insurance based investment products that are considered to have led to consumer detriment, this is intended to exclude products with unreasonable exit charges, including fiscal penalties

incorporate a clause, condition or trigger that allows the insurance undertaking to materially alter the nature, risk or pay-out profile of the IBIP; (c) there are options to surrender or otherwise realise the IBIP at a value that is available to the customer; (d) it does not include any explicit or implicit charges which have the effect that, even though there are technically options to surrender the IBIP, doing so may cause unreasonable detriment to the customer, because the charges are disproportionate to the cost to the insurance undertaking of the surrender; (e) it does not in any other way incorporate a structure which makes it difficult for the customer to understand the risks involved.”

Contracts for IBIPs can be complicated and difficult to understand for consumers. Distributors, either insurance undertakings or insurance intermediaries, therefore play an important role in processing information for the consumer and guiding consumers in choosing suitable insurance policies. Prior to the advent of the IDD, consumer protection standards for the sales of insurance-based investment products were not considered sufficient at EU level to reduce the risk of mis-selling of those products, as the IMD did not contain specific rules for the sale of life insurance products with an investment element. This was so in spite of the fact that these products are generally more complicated and represent higher risks for retail consumers than other insurance products. Hence, IDD stipulated additional conduct of business rules for the sale of IBIPs, and it provided for the case that a differentiation should exist between complex and non-complex IBIPs. Where an IBIP is considered non-complex, Member States may allow insurance distributors to not undertake some of the assessments (suitability and appropriateness) during the sales process that are normally necessary for the distribution of IBIPs. The EIOPA technical advice on the criteria to be used to assess “other non-complex IBIPs” aimed to facilitate the identification of “other non-complex IBIPs”, such that only those products for which the risks are readily understood by customers, can be sold by execution-only. It also aimed to promote the consistent application of the IDD with respect to the identification of “other non-complex insurance-based investments” to be consistent with the line taken in the delegated acts expected to be adopted under Article 25(8) of MiFID II. Those aims are aligned with those under the IDD, i.e. the aim of improving insurance regulation in a manner that will facilitate market integration,

the aim of establishing the conditions necessary for fair competition between distributors of insurance products and the aim of strengthening consumer protection, in particular with regards to IBIPs. It follows that an overly strict approach would not only be disadvantageous for insurance undertakings and insurance intermediaries, but also for customers and potentially for NCAs. Hence, the adoption of criteria based on MiFID II seemed like the best solution in many respects, i.e. firstly because it was considered as striking the appropriate balance between the interests of insurance distributors and those of their customers and because it was considered as enabling the necessary flexibility at NCA level via the provision of criteria for other “non-complex insurance-based investments” at EU level. Not least, at customer level it seemed reasonable to prevent insurance undertakings and insurance intermediaries from making insurance products available for sale via execution-only which do not meet the criteria, while enabling customers to execute an order for products if the criteria are met.¹⁹

5. Comparison Between the Rules on Financial Products & Their Effect on IBIPs.

The IDD ushers in a number of changes versus the IMD including additional requirements for IBIPs and the introduction of an Insurance Product Information Document (IPID) for non-life insurance products. In relation to cross-selling, if an ancillary product or service, which is not insurance based, is offered together with an insurance product, then the distributor must inform the customer about the components, costs, charges, and risks of each component. IDD also introduces product oversight and governance requirements similar to MiFID II for all insurance products (with an exemption for insurance of large risks). The approval process for each insurance product should be defined as proportionate to the nature of the insurance products that are about to be sold to customers. It should incorporate the identification of the target market, the risk assessment and assure that the distribution strategy is aligned with the identified market. Regular reviews must also be performed to

¹⁹ EIOPA, Technical Advice on possible delegated acts concerning the Insurance Distribution Directive, 1/2/2017, EIOPA-17/048, <https://eiopa.europa.eu/Publications/Consultations/EIOPA%20Technical%20Advice%20on%20the%20IDD.pdf>

check that products remain effectively distributed and consistent with the objective of the respective target markets. This requires manufacturers to put at the distributors' disposal all product-related information deemed necessary. Conflicts of interests' management will now be subject to higher standards, which will be further detailed in the delegated acts. Appropriate information must always be available to customers before the signing of the insurance contract. In relation to inducements, enhanced actions should be taken in order to prevent the negative effects of any inducements on the quality of the relevant service to the customer and the insurance company's or intermediary's duty to act honestly, fairly and professionally in accordance with the best interests of their customers. To that end, the insurance distributor should develop, adopt and regularly review policies and procedures relating to conflicts of interest with the aim of avoiding any detrimental impact on the quality of the relevant service to the customer and of ensuring that the customer is adequately informed about fees, commissions or benefits. In relation to assessing the suitability and appropriateness of this is conducted by insurance companies that provide advice to customers on IBIPs so as to enable them to recommend to the customer or potential customer the IBIPs that are suitable for that person. Where a bundle of services or products is envisaged, the assessment must consider whether the overall bundled package is appropriate. ²⁰

Conflicts of Interest: Article 18 of MiFID requires firms to take all reasonable steps to identify conflicts of interest both between themselves and their clients and among their clients. Article 13 of MiFID requires firms to maintain and operate effective organisational and administrative arrangements with a view to taking steps in order to prevent conflicts of interest from having an adverse effect on client interests. Where these arrangements cannot ensure with reasonable confidence that the risk of damage to client interests will be prevented, the firms must clearly disclose the conflicts to the clients. The MiFID delegated directive 2006/73/EC sets out in article 21 relevant

²⁰ Deloitte, IDD: The MiFID of Insurance, 2016
https://www2.deloitte.com/content/dam/Deloitte/gr/Documents/financial-services/gr_insurance%20distribution%20directive_noexp.pdf

factors for assessing whether a conflict of interest is detrimental to the client. These are: whether the firm is likely to make a financial gain or avoid a financial loss, at the expense of the client; whether the firm has an interest in the outcome of a service which is distinct from the client's interest in that outcome; whether the firm has a financial or other incentive to favour the interest of another client or group of clients over the interests of the client; whether the firm carries on the same business as the client; and whether the firm or that person receives or will receive from a person other than the client an inducement in relation to a service provided. Article 22 of the MiFID delegated directive states that firms' conflicts of interest policy must be set out in writing and be appropriate to the size and organisation of the firm and the nature, scale and complexity of its business. The conflicts of interest policy must: identify the circumstances which constitute or may give rise to a conflict of interest entailing a material risk of damage to the interests of one or more clients; and specify procedures to be followed and measures to be adopted in order to manage such conflicts.

MiFID II imposes more onerous obligations on firms to manage conflicts of interest. The changes introduced by article 23 of MiFID II are: a new requirement to take all appropriate steps, which is more onerous than the current requirement to take reasonable steps in order to identify conflicts of interest; a new requirement to put systems and controls in place to prevent as well as manage conflicts of interest that cannot be prevented; and where organisational arrangements are not sufficient to prevent conflicts from adversely affecting client interests, a new requirement to make an enhanced disclosure of the conflict and the steps taken to mitigate the risks before undertaking any business on the client's behalf. The disclosure must be in a durable medium and include sufficient detail to enable the client to make an informed decision with respect to the service in the context of which the conflict arises. Disclosure may only be used as a way of managing conflicts of interest as a measure of last resort. Where a firm relies on disclosure, it is required to state expressly that the organisational and administrative arrangements established by the firm to prevent or manage conflicts are not sufficient to ensure, with reasonable confidence, that the risks of damage to the

interests of the client will be prevented. A firm is also required to assess and periodically review (at least annually) its conflicts of interest policy.

Inducements: A firm must act honestly, fairly and professionally in accordance with a client's best interests (article 19 of MiFID). Article 26 of MiFID delegated directive 2006/73/EC expands this in relation to inducements. Firms are not regarded as acting honestly, fairly and professionally in accordance with clients' best interests if they pay or are paid a fee, commission or non-monetary benefit for providing investment or ancillary services to clients in exchange for investment or ancillary services, unless they can rely on an exemption. The exemptions are: fees/commissions/non-monetary benefits paid or provided to or by the client; fees/commissions/non-monetary benefits paid or provided to or by a third party where: - prior to the provision of the service the nature and amount of the fee/benefit is disclosed to the client in an understandable manner (where the amount cannot be ascertained, the method of calculating that amount, must be clearly disclosed to the client); - the fee/benefit is designed to enhance the quality of the relevant service to the client and; - the fee/benefit does not impair the firm's compliance with its duty to act in the client's best interests; fees necessary for the provision of investment services e.g. custody costs and legal fees.

MiFID II revises the rules around inducements indicating that the original provisions did not deal with inducements in a satisfactory fashion. The updated MiFID introduces an innovative way of addressing them that aims to embolden the provisioned requirements. Hence, inducements in the context of investment advice on an independent basis and portfolio management are completely banned. The inducements rules regime in articles 24(7) – 24(9) of MiFID II provide that the current MiFID regime applies for all MiFID II firms but stricter rules apply to independent advisers and portfolio managers. Firms that provide independent advice to clients and/or portfolio management may not accept fees, commissions, monetary benefits and non-monetary benefits by any third party in relation to the provision of services to clients. Regarding minor non-monetary benefits, their acceptance is allowed, provided that: the benefits are capable of enhancing the quality of the service provided; the benefits are of a scale and nature such that they could not impair compliance with the firm's duty to

act honestly, fairly and professionally in accordance with the clients' best interest; the nature and amount of any benefit is clearly disclosed to the client; and the client is informed about mechanisms for transferring the fee/ commission/monetary benefit/non-monetary benefit received. Article 24(9) of MiFID II states that any payment or benefit which is necessary for or enables the provision of investment services cannot give rise to conflicts with the firm's duty to act honestly, fairly and professionally in accordance with the client's best interest. Such payments or benefits include custody costs, settlement and exchange fees, regulatory levies or legal fees. Firms are also required to keep records to show that any fees, commissions or non-monetary benefits paid or received by the firm are designed to enhance the quality of the relevant service to the client. In addition, firms that provide independent advice to clients and/or portfolio management must set up and implement a policy to ensure that any fees, commissions or any monetary benefits paid or provided by any third party are allocated and transferred to each individual client.²¹ In short, MiFID II distinguishes between the rules that apply to investment services of investment advice on an independent basis and portfolio management and all other, non-independent investment services. Certain criteria need be satisfied to determine 'independence'. The ESMA maintained that the proposals in this area will increase investor protection by specifying the requirements for advice to be considered 'independent'. These proposals aimed at better distinguishing different types of advice provided to make it easier for clients to understand the nature and basis of investment provided to them and a selection process that fosters a fair and appropriate comparison of different financial instruments is without any doubt beneficial for investors. ESMA also elaborated on the essence of 'sufficiently diverse financial instruments available on the market' in its Technical advice. The reason for placing emphasis on this diversification of MiFID II hinges on the premise that it is closely intertwined with the new regime on inducements and it is critical to focus on the substance of this issue and pave the way for delineating the new

²¹ Pinsent Masons, Conflicts of interest and inducements, 21/10/2016
<https://www.pinsentmasons.com/PDF/2016/Mifid%20II/MiFID-II-Conflicts-of-interest.pdf>

inducements regulatory framework. MiFID II seeks to buttress the previous regime under MiFID with regards to the requirements for third party payments and benefits.²²

IBIPs under IDD and MiFID II: MiFID II defines an IBIP as “an insurance product which offers a maturity or surrender value and where that maturity or surrender value is wholly or partially exposed, directly or indirectly, to market fluctuations”. This indicates that an IBIP would need to include an investment component that is expected to provide a variable rate of return. In addition to the non-life insurance products listed in Annex I to Directive 2009/138/EC (Solvency II), MiFID II excludes the following from the definition of an IBIP: life insurance contracts where the benefits under the contract are payable only on death or in respect of incapacity due to injury, sickness or infirmity; pension products which, under national law, are recognised as having the primary purpose of providing the investor with an income in retirement, and which entitles the investor to certain benefits; officially recognised occupational pension schemes falling under the scope of Occupational Pension Funds Directive 2003/41/EC or the Solvency II; individual pension products for which a financial contribution from the employer is required by national law and where the employer or the employee has no choice as to the pension product or provider. These exclusions result in a small selection of products, for example, unit-linked policies, with-profits policies and investment-linked income annuities (which are not considered pension products) that must comply with the IDD additional consumer protection requirements and, as confirmed by Recital 42 of the IDD, provide information in the form of a KID too. Article 26 IDD makes clear that Chapter VI requirements which apply only to IBI are additional to the requirements set out in Article 17, 18, 19 and 20 which apply to all products within scope of the IDD. Broadly, the additional IDD requirements on IBI products are as follows: Article 27 (Prevention of conflicts of interest); Article 28 (Conflicts of interest); Article 29 (Information to customers); Article 30 (Assessment of suitability and appropriateness and reporting to customers). Under Article 27 IDD, an insurance intermediary or an undertaking carrying on distribution of IBI products is expected to

²² G. Papaconstantinou, *Investment Bankers in Conflict: The Regime of Inducements in MiFID II and the Member States’ Struggle for Fairness*, ERCL 2016; 12(4): 356–390, 367.

maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps to prevent a conflict of interests, which as determined under Article 28 IDD, could adversely affect the interests of customers. The wording in Article 27 is purposefully vague because the IDD, like the IMD, is a minimum harmonisation instrument. This means that the details as to what 'effective organisational and administrative arrangements' are necessary will be determined by the national competent authorities.²³

6. The response of ESMA on the draft regulatory technical standards (RTS)

The KID for PRIIPs was introduced by the PRIIPs Regulation. The explanatory memorandum to the proposal of the European Commission outlined the intention to improve the comparability and comprehensibility of information being provided to retail investors in the EU, as an important step to improve the protection of retail investors, to aid those investors in comparing between different PRIIPs, and to support the European single market. The PRIIPs Regulation set out a number of features of the KID but left details of this information and its presentation to regulatory technical standards (RTS). The ESAs have been working since 2014 on finalising proposals for these RTS. The draft RTS have been prepared to offer a sound basis for comparing and understanding a wide range of PRIIPs.

On March 31st, 2016 ESMA issued the final draft regulatory technical standards ("RTS") with regards to presentation, content, review and provision of the key information document, including the methodologies underpinning the risk, reward and costs information in accordance within PRIIPs.

The draft RTS relate to three Articles under the PRIIPs Regulation, i.e. the presentation and content of the Key Information Document (KID), including methodologies for the calculation and presentation of risks, rewards and costs within the document, under Article 8 (5); the review, revision,

²³ Clifford Chance, MiFID II & IDD: The impact on insurance based investment ("IBI") products, 1/6/2016, [file:///C:/Users/kpkn201/Downloads/MiFID II and IDD the impact on insurance based investment products 6032695%20\(3\).pdf](file:///C:/Users/kpkn201/Downloads/MiFID%20II%20and%20IDD%20the%20impact%20on%20insurance%20based%20investment%20products%206032695%20(3).pdf)

and republication of KIDs, under Article 10 (2); and the conditions for fulfilling the requirement to provide the KID in good time, under Article 13 (5). The draft RTS text and accompanying Annexes set out proposals in these areas. They reflect the responses to a final Consultation Paper (JC/CP/2015/073) published on the 11 November 2015, which itself followed a general Discussion Paper (JC/DP/2014/02) published on 17 November 2014, and a Technical Discussion Paper (JC/DP/2015/01) published on 23 June 2015. The draft RTS combine the measures related to Article 8 (5), Article 10 (2) and Article 13 (5). The draft RTS under Article 8 (5) specify the presentation and content of the KID and apply on the PRIIP manufacturer when drawing up a KID. They address the different sections of the KID set out in Article 8 (3), and the underlying methodologies necessary for obtaining and calculating information to be included in the KID, for instance in relation to risks, rewards and costs. It includes a mandatory template to be used, including certain mandatory texts. The template includes details of the layout that must be followed. Whereas, for the risk and reward section of the KID, the draft RTS requires a summary risk indicator (SRI) that comprises seven classes, the format of which is to follow the template contained in the RTS.²⁴ The draft RTS also contains a methodology for the assignment of each PRIIP to one of the seven classes in the SRI, and for the inclusion of narrative explanations, and for certain PRIIPs, additional warnings. The draft RTS includes requirements on performance scenarios and a format that must be followed for the presentation of these scenarios. These are to be presented in tables, showing possible performance for different time periods and at least three scenarios. There are also requirements on the calculation of the figures to be included. The draft RTS also cover requirements on the presentation of costs, including the figures that must be calculated and the format to be used for these. Detailed methods are included for the measurements and calculations needed for completing the prescribed format for each PRIIP. The cost

²⁴ ESMA, Final draft regulatory technical standards, JC 2016,21
https://www.esma.europa.eu/sites/default/files/library/jc_2016_21_final_draft_rts_priips_kid_report.pdf

figures include a presentation of the accumulation of the costs in monetary and percentage terms for standardized period(s), and a breakdown of these costs in percentage terms.²⁵

For PRIIPs that offer multiple investment options to the retail investor, the draft RTS set out two approaches that the PRIIP manufacturers may follow:

- Separate KIDs are produced for each option, containing information about both the PRIIP in general and about the option in particular;
- The information that would normally be in a single stand-alone KID is separated. A generic KID is produced for the PRIIP in general, and specific information is provided in a separate document or documents about the details of the options (including on their investment objectives, their risks and rewards, and their specific costs).

The draft RTS for Article 10 sets out requirements on the PRIIP manufacturer for the revision and republication of the KID at least each year, and an obligation to conduct ad hoc revisions, when necessary. The draft RTS for Article 13 sets out requirements on the person selling or advising on the PRIIP for the KID to be provided sufficiently early for a retail investor to be able to take its contents into account when making an investment decision.

On 10 November 2016, the Commission issued a response notifying its Intention to amend the draft Regulatory Technical Standards. The Commission endorsed the draft RTS on 30 June 2016 by adopting the Commission Delegated Regulation of 30 June 2016²⁶. The Council approved them but the European Parliament had rejected them on 14 September 2016, calling for the following modifications: a) Multi-option PRIIPs: the treatment of multi-option PRIIPs should be clarified, in particular in relation to the explicit exemption granted to certain collective investment undertakings

²⁵ ESMA, Final draft regulatory technical standards, JC 2016,21
https://www.esma.europa.eu/sites/default/files/library/jc_2016_21_final_draft_rts_priips_kid_report.pdf

²⁶ Commission Delegated Regulation of 30 June 2016 supplementing Regulation (EU) No 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance-based investment products (PRIIPs) by laying down regulatory technical standards with regard to the presentation, content, review and revision of key information documents and the conditions for fulfilling the requirement to provide such documents (C(2016)3999 final)

under the PRIIPs Regulation; b) a 4th performance scenario: the methodology for the calculation of future performance scenarios should reflect that retail investors may also lose money in an adverse scenario concerning certain PRIIPs, or in relation to certain products that have regularly led to losses over the recommended minimum holding period; c) a comprehension alert: detailed guidance should be provided regarding the use of the 'comprehension alert' in order to prevent inconsistent implementation of this element of the KID across the single market. More specifically, the European Commission, carefully assessed the choices jointly made by the three European Supervisory Authorities to allow comparability across different PRIIPs and concluded that the draft RTS marked a significant improvement in terms of transparency of those types of financial products. However, the Commission felt that, to effectively address the concerns expressed by the European Parliament, the following amendments to the Commission Delegated Regulation should be envisaged:

Multi-option PRIIPs: to take account of the specific nature of multi-option PRIIPs offering, as underlying investment, a range of undertakings for collective investments in transferable securities (UCITS) and other non-UCITS funds that are marketed to retail investors under national law, the Commission proposes to allow manufacturers of such multi-option PRIIPs to use the UCITS information document as an appropriate means of providing retail investors with more detailed pre-contractual information. The proposed amendment should apply in accordance with the transitional period in the PRIIPs Regulation for UCITS and non-UCITS funds;

Fourth performance scenario: the Commission proposes the following amendments to clarify the conditions that trigger the inclusion of a fourth performance scenario in Annex IV to the Commission Delegated Regulation, and to make some consequential adjustments to the existing performance scenarios. In particular, to reflect a more prudent approach, the mean of historical returns should be replaced with zero. The objective is to avoid that assumptions are made on the direction of the future market expectation over the holding period in the neutral scenario. An additional scenario should be included — a fourth scenario that may be renamed as 'stress scenario' — showing how the PRIIP performs under stressed market conditions. The stress scenario should be

mandatory as it is meant to complement the three 'normal' scenarios giving information on the possible outcome of the PRIIP where extreme market conditions materialise, given the assumptions made. The stress scenario should be identified through a stress-test analysis of the historical volatility over a pre-deemed short-term period, which should determine: i) the length of the windows of historical returns to be considered to generate the distribution of volatility; ii) the percentile of the distribution of volatility that identifies the stressed volatility; iii) the percentile of the distribution of returns that identifies the stress scenario.

Comprehension alert: the Commission proposes to provide criteria in the Commission Delegated Regulation to facilitate a consistent use of the comprehension alert in the KID. Based on Recital 18 of the PRIIPs Regulation, the criteria should be the following: a) the PRIIP invests in underlying assets that are not commonly invested in by retail investors; b) the PRIIP uses a number of different mechanisms to calculate the final return of the investment, creating a greater risk of misunderstanding on the part of the retail investor; c) the investment's pay-off takes advantage of retail investor's behavioural biases, such as a teaser rate followed by a much higher floating conditional rate, or an iterative formula.

Outcomes of the PRIIPs consumer testing, as undertaken by the Commission, suggested that simple disclosure approaches are associated with better comprehension of the KID. The presentation of administrative costs in relation to biometric components of insurance-based investment products in the KID does not currently serve this purpose. The Commission therefore proposed to reduce this complexity ensuring at the same time the same level of retail investor protection through the following amendments: a) in "What are the cost" section, to amend the presentation of "Ongoing costs" by deleting "Insurance costs" and bundling them into the "Other ongoing costs"; and b) in "What is this product" section, to locate all the information on insurance benefits and costs. The Commission invited ESAs to submit amended RTS within the six weeks²⁷. The ESAs discussed the

²⁷ European Commission, Intention of the Commission to amend the draft Regulatory Technical Standards jointly submitted by EBA, ESMA and EIOPA under Articles 8(5), 10(2) and 13(5) of Regulation (EU) No 1286/2014, Ares(2016)6353871 - 10/11/2016,

amendments to the draft RTS received from the European Commission, but there were differing views expressed, concerning – in particular – the treatment of multi-option products, the criteria to determine whether a comprehension alert should be included in a KID, and the provisions in the RTS on the credit risk mitigation factors for insurers. Concerns were also raised regarding the credibility of the ‘moderate’ scenario if it is either zero or - once costs are taken into account - if there is an indication of a expectation of losses over the whole recommended holding period. Though discussions within the ESAs showed that there was recognition that there are pros and cons to this approach also, the methodology in the ESAs’ original draft RTS was still considered to be preferable. However, ESA stated that If the Commission nevertheless should wish to amend the RTS along the lines it has proposed, one option the ESAs considered was the use of the mean of the distribution of risk free returns, adjusted for dividend yields. It was also considered important for alternative approaches to be investigated as part of the review process.²⁸ On the expiry of the stipulated by the Commission six week period, the ESAs did not adopt the final Opinion.

7. The FCA Consultation on the IDD implementation

The First Consultation Paper: the IDD covers the initial authorisation, passporting arrangements and ongoing regulatory requirements for insurance and reinsurance intermediaries. However, it also covers wider aspects, including organisational and conduct of business requirements for insurance and reinsurance undertakings. The IDD also introduces requirements in new areas. These include product oversight and governance, and enhanced conduct rules for insurance based investment products, where its stated intention is to more closely align the customer protections with

https://esas-joint-committee.europa.eu/Publications/Letters/Ares%206353871_Letter%20to%20EBA%20ESMA%20and%20EIOPA%20-%20PRIIPs%20draft%20RTS.pdf

²⁸ EOPA, EBA, ESMA, ESAs’ response to the intention of the European Commission to amend the draft Regulatory Technical Standards (RTS) jointly submitted by EBA, ESMA and EIOPA under Articles 8(5), 10(2) and 13(5) of Regulation (EU) No 1286/2014, <https://esas-joint-committee.europa.eu/publications/letters/esas-2016-81%20joint%20letter%20on%20rts%20on%20priips.pdf>

those provided by MiFID II. In March 2017, the FCA issued the first of two consultation papers, i.e. CP17/7 “Insurance Distribution Directive Implementation – Consultation Paper I”²⁹ setting out its proposals for implementing the IDD. Consultation paper CP17/7 covers the FCA’s proposals for the following areas: a) application of the Directive, b) professional and organisational requirements, c) complaints handling and out-of-court redress, d) changes to conduct of business rules (for non-investment insurance contracts) and e) the regulatory regime for ancillary insurance intermediaries. By issuing the first of two consultation papers, i.e. CP17/7 “Insurance Distribution Directive Implementation – Consultation Paper I”³⁰ the FCA has provided some useful clarity on its implementation proposals for the IDD in the UK.

The FCA’s CP17/7 “Insurance Distribution Directive Implementation – Consultation Paper I”³¹ follows the February 2017 “HM Treasury’s consultation on the implementation of the IDD”³² whereby the Treasury plans have confirmed the UK Government’s intention that the IDD will be transposed into UK law despite the country moving towards an exit from EU membership.³³ As stated before, the IDD being a minimum harmonising directive, the UK government has the option of making its provisions more restrictive, i.e. by 'gold-plating' the legislation, as appropriate for the UK market. This has already occurred for the IMD, which the IDD updates, however the consultation invited comments from respondents on the appropriateness of continuing to do so for the IDD. In its proposals for IDD transposition, the Treasury stated that it had considered whether to exempt the so-called 'introducers' from new UK rules. However, it had decided against the idea of doing so, as

²⁹ FCA, Insurance Distribution Directive Implementation – Consultation Paper I, CP17/7, March 2017, <https://www.fca.org.uk/publication/consultation/cp17-07.pdf>

³⁰ FCA, Insurance Distribution Directive Implementation – Consultation Paper I, CP17/7, March 2017, <https://www.fca.org.uk/publication/consultation/cp17-07.pdf>

³¹ FCA, Insurance Distribution Directive Implementation – Consultation Paper I, CP17/7, March 2017, <https://www.fca.org.uk/publication/consultation/cp17-07.pdf>

³² HM Treasury, Consultation: Transposition of the IDD, Feb. 2017, <https://www.gov.uk/government/consultations/transposition-of-the-insurance-distribution-directive/transposition-of-the-insurance-distribution-directive>

³³ Pinsent Masons, “‘Introducers’ should be subject to UK insurance distribution rules, says Treasury”, February 2017, <https://www.out-law.com/en/articles/2017/february/introducers-should-be-subject-to-uk-insurance-distribution-rules-says-treasury/>

introducers carry out activities that go beyond the mere provision of information. The IDD, amongst other things, sets detailed requirements about the information that insurance distributors must disclose to customers before the conclusion of an insurance contract. Under the EU framework businesses that merely provide information about insurance products or an insurance intermediary or insurer to potential policyholders are exempt from the IDD regime so long as they do not take any additional steps to assist the customer in concluding an insurance contract. However, the Treasury had substantive concerns that stopped it from broadening the information-only exemption to account for introducers, including that such a move might spur cold calling to customers. It expressed the following opinion, depicting the UK Government's position, i.e. that although there had not been so far any evidence of consumer detriment where the only activity was the provision of information, nevertheless, it was believed that there was sufficient evidence that some firms acting as introducers might not just provide information but also actively seek to persuade customers.³⁴ Hence, it was believed that in an effort to afford the maximum consumer protection, such an exemption should not apply and proposed the amendment of the FSMA (Regulated Activities) Order 2001 so that arrangements which would involve only the provision of information would effectively be out of the scope of regulation, in accordance with the language used in the IDD. The consultation paper, also confirmed that it intends for businesses that sell life and liability products as add-ons to a non-insurance product to be subject to the IDD regime.³⁵

Coming back to the FCA's CP17/7 "Insurance Distribution Directive Implementation – Consultation Paper I"³⁶, the proposed policy changes have been developed in the context of the UK's current regulatory framework within the EU and the FCA has stated that it will keep these policy

³⁴ Pinsent Masons, "Introducers' should be subject to UK insurance distribution rules, says Treasury", February 2017, <https://www.out-law.com/en/articles/2017/february/introducers-should-be-subject-to-uk-insurance-distribution-rules-says-treasury/>

³⁵ Pinsent Masons, "Introducers' should be subject to UK insurance distribution rules, says Treasury", February 2017, <https://www.out-law.com/en/articles/2017/february/introducers-should-be-subject-to-uk-insurance-distribution-rules-says-treasury/>

³⁶ FCA, Insurance Distribution Directive Implementation – Consultation Paper I, CP17/7, March 2017, <https://www.fca.org.uk/publication/consultation/cp17-07.pdf>

changes under review pending completion of negotiations for the UK's exit from the EU. It is believed that the FCA and government consultations will move in tandem to ensure a streamlined implementation process and to ensure firms' readiness for the deadline date of 23 February 2018, the date by which EU member states must have transposed and implemented all of the provisions into national law. The consultation covers topics including how the IDD will generally apply to the UK regulatory system, professional and organisational requirements for insurance distributors, changes to conduct of business rules for non-life insurance products, and the regulatory regime for ancillary insurance intermediaries. The FCA proposes to keep any existing UK provisions that are already in place and that, in some cases, go beyond the IDD requirements. Where the IDD goes beyond existing UK provisions, the FCA proposes to copy most of the new provisions into its handbook. This clarification of how the FCA proposes to approach implementation of the IDD serves as a positive sign and confirmation that the IDD will not represent a major overhaul of the existing distribution regime. Unlike with the IMD, the FCA does not appear to be planning extensive additions to the regulations, opting instead for a minimum harmonisation approach, although where existing rules go further than IDD minimums they will remain unchanged. It should be noted, however, that the FCA has identified areas where its rules and guidance will need to be changed to give effect to the IDD. In some cases these proposed changes will simply codify specific provisions, but notwithstanding those case, the FCA is also proposing changes that will apply its requirements to all participants in the distribution chain, not just customer-facing distributors. In addition to changes which enhance familiar concepts such as the promotion of customer interests and pre-contract clarity, the consultation paper proposes some new specific obligations, in respect of commission disclosure, training requirements and cross-selling, that it considers are required to bring its rules in line with the new EU standard.³⁷

³⁷ FCA, Insurance Distribution Directive Implementation – Consultation Paper I, CP17/7, March 2017, <https://www.fca.org.uk/publication/consultation/cp17-07.pdf>; Pinsent Masons, “‘Introducers’ should be subject to UK insurance distribution rules, says Treasury”, February 2017, <https://www.out-law.com/en/articles/2017/february/introducers-should-be-subject-to-uk-insurance-distribution-rules-says-treasury/>

The Second Consultation Paper and its effect on IBIP: When issuing the first consultation paper, CP17/7 “Insurance Distribution Directive Implementation – Consultation Paper I”³⁸ the FCA announced that a second consultation would be published later in the year to cover conduct of business rules for life business and insurance-based investment products and product oversight and governance.

The second consultation paper titled “CP17/23: Insurance Distribution Directive implementation – Consultation Paper II” was issued on 24/7/2017 and followed up from CP17/7 with further proposals on how on changes to the rules for implementing the IDD requirements for life insurance business, including information provision requirements, and additional requirements related to the distribution of IBIPs, as well as covering changes to the rules to implement requirements in the IDD that apply to life and non-investment insurance business, including product oversight and governance, and professional and organisational requirements provisions. The FCA asks for feedback to the consultation up until 20/10/2017. Upon closure of the said consultation on 20/10/2017, the FCA will publish feedback on responses and issue a Policy Statement s in December 2017.³⁹

Changes to the FCA’s rules to implement the IDD requirements for life insurance business, including information provision requirements, and additional requirements related to the distribution of insurance-based investment products (IBIPs):

- a. firms’ general obligations (Chapter 4);
- b. information disclosure to customers (Chapter 5);
- c. inducements (Chapter 6);
- d. suitability (Chapter 7); and
- e. appropriateness (Chapter 8).

³⁸ FCA, Insurance Distribution Directive Implementation – Consultation Paper I, CP17/7, March 2017, <https://www.fca.org.uk/publication/consultation/cp17-07.pdf>

³⁹ P. Estlin, “FCA Consults Again on IDD Implementation”, LexisNexis Financial Services Blog, <http://blogs.lexisnexis.co.uk/fs/fca-consults-again-on-idd-implementation/>

CP17/23, outlines the FCA's approach to the rules on IBIPs. It is the FCA's intention to align IBIPs and pensions to MiFID II standards because they are substitutable for MiFID II investment products and already subject to the COBS sourcebook, even though they are not subject to MiFID and will not be within scope of MiFID II. Accordingly, this intention supports the FCA's view that a broadly consistent regulatory regime helps to maintain an appropriate level of protection for consumers and a consistent framework for firms.

The main areas discussed in CP17/23 which would be affected by the application of MiFID II standards are: a) the information requirements: Article 29 of the IDD contains the information requirements for IBIPs customers, who must be provided with information on all costs and related charges of the investment product. As a minimum, the IDD expects firms to provide customers with a periodic assessment of the suitability of the recommended IBIP (if advice is provided), guidance on and warning of the risks associated with IBIPs and costs relating to distribution of the products, including the cost of the advice, where relevant. All of this information must be delivered to the customer in a comprehensible form and presented in a standardised format. Article 30(1) of the IDD sets out the rules for assessing the suitability and appropriateness and reporting to customers, and like Article 25(2) of MiFID II, the insurance intermediary or the insurer will be expected to obtain information from the customer on its ability to bear losses, investment objectives and risk tolerance to ensure that the recommended IBIP(s) is suitable for the customer, taking into account the customer's risk tolerance and ability to bear losses; b) Inducements: Article 29(2) of the IDD requires an insurance intermediary or insurer to ensure that any payment of fees, commission or non-monetary benefit in connection with the distribution of an IBIP product or ancillary service to or by a third party does not have a detrimental impact on the quality of the service to the customer and does not impair the insurance intermediary or insurance firm's duty to act honestly, fairly and professionally in the best interests of its customers. Similarly, Article 24(7)(b) of MiFID II prohibits advisers from accepting and retaining fees, commissions or any monetary or non-monetary benefits from third parties unless such benefits are 'minor non-monetary benefits'. The FCA intends to implement Article

29(2) in COBS 2.3A and highlight the areas in which the IDD requirements differ from those in MiFID II or the current rules.⁴⁰ More specifically, The FCA proposes to apply the high level inducement rule in COBS 2.3A to firms doing insurance distribution activities in relation to IBIPs, and within that section include new requirements as necessary to implement the Article 29(2) requirement (and for this business COBS 2.3 will be disapplied); maintain the existing requirements in COBS 2.3 for other life policies without changes; and continue to apply the RDR rules in COBS 6. The FCA is also considering whether to ‘level up’ to MiFID II requirements. In some areas, the MiFID II delegated acts include additional detail compared to the IDD with regard to inducements⁴¹; c) suitability: The FCA proposes integrating the IDD requirements for suitability into the new COBS 9A for IBIPs. The current suitability requirements in COBS 9 will continue to apply to other life policies⁴²; d) appropriateness: for non-advised sales, insurance intermediaries or insurance firms will be expected to consider the customer’s experience and knowledge of investments to assess whether the IBIP is appropriate for them (Article 30(2) of the IDD). Where the IBIP is not appropriate, the insurance intermediary or the insurance firm will have to warn the customer that this is the case. The same warning must be given where insufficient information of the customer’s knowledge and experience has been given. At present, the FCA’s rules on appropriateness (COBS 10) do not apply to life policies or IBIPs and it is proposed that they will feature in a new COBS 10A chapter solely applying to IBIPs.⁴³ The associated record-keeping requirements, including a minimum retention period of five years, will be integrated into SYSC 9 for intermediaries and SYSC 3 for insurers in line with the FCA’s approach to suitability and MiFID II. The FCA proposes to exercise the derogation to allow non-complex IBIPs to be sold under the execution-

⁴⁰ P. Estlin, “FCA Consults Again on IDD Implementation”, LexisNexis Financial Services Blog, <http://blogs.lexisnexis.co.uk/fs/fca-consults-again-on-idd-implementation/>

⁴¹ James Smethurst, George Swan, Chris Chapman and Priti Lancaster, Insurance bulletin: FCA publishes second Insurance Distribution Directive consultation paper, Freshfields Bruckhaus Deringer LLP, <https://www.lexology.com/library/detail.aspx?g=56984582-052e-4f62-9c5c-4c9c5783a17c>

⁴² James Smethurst, George Swan, Chris Chapman and Priti Lancaster, Insurance bulletin: FCA publishes second Insurance Distribution Directive consultation paper, Freshfields Bruckhaus Deringer LLP, <https://www.lexology.com/library/detail.aspx?g=56984582-052e-4f62-9c5c-4c9c5783a17c>

⁴³ P. Estlin, “FCA Consults Again on IDD Implementation”, LexisNexis Financial Services Blog, <http://blogs.lexisnexis.co.uk/fs/fca-consults-again-on-idd-implementation/>

only process and integrate the IDD execution-only requirements into the new COBS 10A.⁴⁴; e) conflicts of interest: The IDD has a set of provisions designed to stop conflicts of interests leading to consumer harm in the distribution of IBIPs. Articles 27 and 28 of the IDD focus on the need for effective organisational and administrative arrangements by insurance intermediaries and undertakings to avoid conflicts leading to consumer detriment in relation to IBIP distribution. The FCA proposes to maintain the current approach in its rules of applying conflict of interest requirements to distributors of all types of insurance (including all life and general insurance business) rather than limiting the application to IBIP business only. The IDD requirements are broadly consistent with existing rules in SYSC 10, so the FCA notes that the impact on firms should be low, while maintaining existing consumer protections; f) Product oversight and governance: the FCA proposes to introduce a new chapter to the PROD sourcebook to implement the provisions for insurance business. These new rules will replace broadly equivalent existing RPPD guidance for firms within scope of PROD. The product governance provisions will apply to all insurers and insurance intermediaries where those firms manufacture or distribute insurance products. This will include applying the requirements to all insurers, whether they distribute products directly or via intermediaries.⁴⁵

The FCA issued also a third Consultation paper titled “CP17/33: Insurance Distribution Directive implementation – Consultation Paper 3” followed on from CP17/7 and CP17/23 with further proposals on how to implement the IDD in the UK, covering changes to our rules to reflect the requirements of the IDD delegated acts, relating to inducements requirements for IBIPs (Chapter 4) suitability and appropriateness requirements for IBIPs (Chapter 5) disclosure requirements for IBIPs

⁴⁴ James Smethurst, George Swan, Chris Chapman and Priti Lancaster, Insurance bulletin: FCA publishes second Insurance Distribution Directive consultation paper, Freshfields Bruckhaus Deringer LLP, <https://www.lexology.com/library/detail.aspx?g=56984582-052e-4f62-9c5c-4c9c5783a17c>

⁴⁵ James Smethurst, George Swan, Chris Chapman and Priti Lancaster, Insurance bulletin: FCA publishes second Insurance Distribution Directive consultation paper, Freshfields Bruckhaus Deringer LLP, <https://www.lexology.com/library/detail.aspx?g=56984582-052e-4f62-9c5c-4c9c5783a17c>

and mandatory occupational pensions (Chapter 6), *inter alia*. The FCA requests feedback by 25/11/2017. CP17/33 should be read in conjunction with CP17/23.

8. The FCA Policy Statement – PS 18/1: The Effect for English Law

On January 19th, 2018 the FCA published Policy Statement PS 18/1 titled “Insurance Distribution Directive implementation – Feedback and near-final rules for CP17/23, CP17/32, CP17/33, CP17/39 and near-final rules for CP17/07”⁴⁶ as a response, *inter alia* to the feedback received to Consultation Paper 17/33 (CP17/33). The FCA clarified that following publication on 15th January 2018 by the Treasury of the legislation that will allow the full transposition of the IDD⁴⁷, they have on the one hand taken account of the statutory instrument but, as it was not yet finalised, could not publish their final rules in the PS18/1. However, the FCA notes that publishing near-final rules at this stage is beneficial as it gives firms more time to implement the changes they need to make for the IDD. The FCA plans to finalise the rules as soon as the legislation will be finalised and do not expect to make any changes to the near-final rules.

PS18/1 is of interest to insurance and reinsurance companies, intermediaries, other firms and customers in the insurance market, and bodies representing these groups, as well as designated professional bodies and their members, not least customers who have a clear interest in financial markets that operate fairly and transparently, including the way in which firms implement the new requirements of the IDD.⁴⁸ On 20 December 2017, the European Commission (the Commission) proposed delaying the application date of the IDD to 1 October 2018. The Commission is also preparing to postpone the application of two delegated regulations adopted under the IDD. Under this proposal, firms would have until 1 October 2018 to implement the new IDD requirements, hence may be able

⁴⁶ <https://www.fca.org.uk/publication/policy/ps-18-1.pdf>

⁴⁷ The Treasury, Transposition of the Insurance Distribution Directive, 15 January 2018: <https://www.gov.uk/government/consultations/transposition-of-the-insurance-distribution-directive>

⁴⁸ Such as, e.g. the rules about conduct of business and information disclosure.

to comply with the IDD early. In view of the above, the FCA have included a formal transition period in their near-final rules to clarify that firms may adopt some, or all of the new IDD requirements early if they so choose. This transitional provision requires firms to have regard to whether the new requirements are similar in purpose to the current FCA rules, and provide consumer protection similar to, or greater than, the current FCA rules as well as requiring firms to keep a clear record of their decision to comply early, including whether this relates only to a specific requirement or all IDD requirements.⁴⁹ The FCA received 45 responses to CP17/33, most of which supported their proposals or asked for further guidance and, in general, decided to implement the consultation proposals with only minor changes.

In relation to the feedback received with regards to the FCA's proposed approach to the inducements requirements of the IDD, including those in the IBIP regulation⁵⁰ the FCA received seventeen responses to its proposals.⁵¹ Most supported the FCA's approach but two respondents disagreed with it, i.e. one disagreeing with the regulatory burden of disclosing broker earnings, the other providing no reason. Also, upon the end of the consultation the FCA received an email about the application of the rules for acceptable minor non-monetary benefits for retail clients and the position of professional clients. The FCA responded that they were making near-final rules in line with their proposed approach. They pointed out that in alignment with their previous indication in PS17/27 whereby they were still considering whether it is possible for the rules for IBIPs (COBS 2.3A) to apply only the MiFID II-derived high-level requirement that inducements must enhance the quality of the

⁴⁹ <https://www.fca.org.uk/publication/policy/ps-18-1.pdf>, p.5

⁵⁰ http://ec.europa.eu/finance/docs/level-2-measures/idd-delegated-regulation-2017-6229_en.pdf.

⁵¹ In CP17/33 the FCA had proposed to reproduce within COBS 2.3A the relevant provisions on inducements from the IBIP regulation, and to apply these requirements as rules for firms which are subject to our existing rules but not within scope of the IDD and to 'translate' some words and phrases used in the IBIP regulation into Glossary terms as part of a new COBS 1.3; to align the inducements rules for IBIPs with the MiFID II requirements in COBS 2.3A where MiFID II includes relevant additional detail compared to the IDD, because of certain record-keeping obligations, because of sales involving more than one distributor firm and because EOF ongoing assessments that firms must make to ensure that inducements enhance the quality of services. But, the FCA proposed not to apply all of the COBS 2.3A record-keeping obligations to IBIPs, and instead to continue to rely on the high-level requirements within Chapters 3 and 9 of the Senior Management Arrangements, Systems and Controls sourcebook (SYSC). They also proposed a change to COBS regarding minor non-monetary benefits and in order to make sure that this properly reflected the wording of the IDD inducements test for IBIPs, the FCA proposed to include a 'detrimental impact' test; <https://www.fca.org.uk/publication/policy/ps-18-1.pdf>, p.11.

service and also in light of clarifications from ongoing European transposition work in relation to the IDD, they had decided to apply this high-level requirement and moreover, in order to provide further detail to help firms meet the rule, they also proposed to reproduce some of the provisions from the IBIP Regulation. The FCA expectation is to be understood as entailing that firms meeting the MiFID II standard would also meet the IDD standard – in view of an effort for the provision of a single standard across business to which COBS 2.3A applied, including IDD and MiFID II business. However, they noticed the possibility of having at a later stage to take into account the ongoing European transposition work in relation to the IDD. Regarding minor non-monetary benefits, due to the differences in approach in MiFID II and the IDD. In other words, due to the fact that the MiFID businesses are subject to greater restrictions the FCA decided to reflect this difference in their rules in light of the different protection needs for retail and professional clients and have therefore proposed a minor change to the rules to clarify the position as well as having made a minor change to allow firms to receive or make payments or benefits which enable or are necessary for the distribution of an IBIP (e.g. regulatory levies or legal fees) in alignment with existing rules and MiFID II. The FCA believe that these changes will not have any impact on costs and benefits and have strived to produce a set of amended rules aiming to ensure a similar degree of consumer protection as those on which they consulted, hence expect any changes overall to costs and benefits to be minimal.⁵²

In relation to the feedback received with regards to the FCA's proposed approach to the suitability and appropriateness requirements of the IDD, including those in the IBIP regulation⁵³ the FCA received seventeen responses to these proposals mostly supportive of their proposed approach but for five respondents who disagreed with the proposals and supported the view that the proposed rules didn't clarify whether the requirement to conduct an appropriateness test applies where customers top-up existing policies or switch to a fund deemed complex within an existing product and also stated the view that the IDD requirements were not intended to be retrospective or to apply the

⁵² <https://www.fca.org.uk/publication/policy/ps-18-1.pdf>, p. 11-12

⁵³ http://ec.europa.eu/finance/docs/level-2-measures/idd-delegated-regulation-2017-6229_en.pdf.

appropriateness test to existing policies. Once again, the FCA responded that they were making near-final rules in line with their proposed approach, including their approach to record-keeping standards and confirmed that the rules on the application of the appropriateness test were intended to apply to new contracts with effect from the IDD application date. The FCA added that fund switches and exercise of existing contractual options would not trigger such requirements as the application provisions would only apply the rules where a firm would be carrying out insurance distribution activities in relation to an IBIP. The FCA also retained the five-year minimum term for retention of records about suitability and appropriateness and the obligation to hold the records for at least the duration of the relationship between the firm and the customer, which may be longer than five years.⁵⁴

In relation to the information disclosure requirements, the FCA noted that several of their existing rules had not been neither replicated in the IDD nor in the IBIP regulation and hence the FCA maintained current levels of consumer protection where their rules contained additional obligations or greater detail than the IDD and hence had proposed in CP17/33 to introduce rules to make sure they continue to apply to life insurance distribution. Most of the seventeen responses they had received agreed with their proposals and although no respondents had disagreed, some had asked clarifications of the FCA's expectations on a number of points such as whether the disclosures apply to top-ups, switches and other customer-exercised contractual options where a new contract results, whether the requirement to provide a single disclosure of costs and charges for the IBIP and advice would be helpful for customers; whether the annual cost disclosures required by the rules applied only where a firm would be providing ongoing insurance distribution activities; and whether the requirement to disclose 'all costs and charges' could be met by the provision of prescribed disclosure documents (the Key Features Documents and the Key Features illustrations, or the Packaged Retail and Insurance-based Investment Products (PRIIPs) Key Information Document (KID) together with disclosure of any cost of advice and/or arranging activities). The FCA responded that they were making near-final rules in line with their proposed approach. In relation to the clarifications sought the FCA

⁵⁴ <https://www.fca.org.uk/publication/policy/ps-18-1.pdf>, p. 13-14

responded that the requirements applied where a firm was carrying on 'insurance distribution activities' in the sense of the latter being a defined term covering activities such as advising on investments, and assisting in the administration and performance of a contract of insurance and that the firms will need to comply with the disclosure rules where they conducted these activities – including in relation to a customer topping up an existing contract, making a fund switch or exercising other contractual options. In relation to aggregated costs and charges the FCA responded that disclosure could benefit customers by allowing them to see the total charges for an IBIP, taking account of the cost of advice, and enable them to take an informed decision about whether to proceed and that firms would be obliged to provide an itemised breakdown of charges, if requested by a customer or could consider providing this breakdown proactively, if they determined it as important to the customer's ability to understand the product and service. In addition, distributor firms had to provide customers with information about the firm's charging structure before a personal recommendation would be provided, i.e. information on the cost of the advice service and the total charges for the recommended IBIP, taking account of the cost of advice. In relation to annual costs disclosures the FCA responded that those are only required where firms were carrying on insurance distribution activities but firms had to provide customers with periodic reports which would include information on product charges. If any costs and charges associated with the distribution of a life policy were not included in a KID (or if the KID were not to be required for a product) then firms would need to make separate disclosures.

In relation to communicating a number of disclosures to customers 'in good time' before providing a service or before the conclusion of the contract, the FCA noted the received requests for more detailed guidance setting more specific expectations or good practice standards but was of the opinion that this would be inappropriate as any additional detail could reduce flexibility for firms and would go further than in other sectors, such as for MiFID II, which have the same guidance as we are introducing without including more detail.

Finally, in relation to information disclosure requirements for an insurance distributor when an employee becomes a member of a mandatory occupational pension arrangement, without having taken an individual decision to join it, as per article 22(5) of the IDD, the FCA decided not to include any additional rules to implement Article 22(5) as its scope was for it to operate as an exemption rather than as an additional requirement. The FCA pointed out that where pension arrangements caught by the IDD were within their rules, they were applying the relevant IDD requirements without this exemption.⁵⁵

9. Conclusions

IBIPs are an important feature of insurance. However, it has not always been easy to make them widely known to the wider public due to the slow opening of the market for financial services within the EU. Notwithstanding the above remark, the further liberalization of the financial services sector in the EU is today more possible than before and the pace of this occurring process has been at times accelerated due to the introduction of Regulations of major importance, such as PRIIPs. PRIIPs is unique, inter alia, in that it introduces the KID.

Currently, open ongoing discussions between various stakeholders (ESMA, ESAS, Commission) on the amendment of the RTS have resulted in different voices having been raised, in view of a better protection of the assured. ESA has expressed the view that its methodology is fairer as well as the need to investigate a plethora of plurality of approaches.

The awaited response from the Commission, has entailed the endorsement of the bundling - given the interconnectedness of the three RTS to ensure the full consistency of the requirements introduced.

In the UK, following the first and second consultation papers of the FCA on the implementation of the IDD and the FCA policy statement PS18/1, it is concluded that the FCA responded in a way where it a) maintained its rules unchanged where better protection was offered

⁵⁵ <https://www.fca.org.uk/publication/policy/ps-18-1.pdf>, pp. 14-17.

to customers rather than the one available under the IDD⁵⁶; b) proposed alignment with already existing high-level requirements under other legislation (e.g. MiFID II)⁵⁷; c) clarified the extent of the use of rules of the IDD wherever needed⁵⁸ and d) denied to introduce rules which would reduce market flexibility and surpass the ambit of the provisions of MiFID II, hence harming the customer in the first place⁵⁹ or misinterpret the actual ambit of the use of any provision in MiFID II - such as in the case of information disclosure requirements for mandatory occupational pension arrangement of insurance employees where the scope of Article 22(5) of IDD was for it to operate as an exemption rather than as an additional requirement.

⁵⁶ Such as in the case of the information disclosure requirements, whereby the FCA noted that several of their existing rules had not been neither replicated in the IDD nor in the IBIP regulation and hence the FCA maintained current levels of consumer protection where their rules contained additional obligations or greater detail than the IDD and hence had proposed in CP17/33 to introduce rules to make sure they continue to apply to life insurance distribution.

⁵⁷ i.e. in relation to inducements

⁵⁸ In relation to its suitability and appropriateness requirements where this would be needed only in relation to new contracts and where a firm would be carrying out insurance distribution activities in relation to an IBIP.

⁵⁹ Such as e.g. in the case where entailing a number of extended disclosures where it felt that such a practice would overall could reduce flexibility and would go further than in MiFID II and hence would detriment the customer.